

MAYER | BROWN

# NAVIGATING US AGENCY SUBPOENAS

Tips for a Fintech's First Time

CHRISTOPHER LEACH

Partner

+1 202 263 3443

[cleach@mayerbrown.com](mailto:cleach@mayerbrown.com)

ORI LEV

Partner

+1 202 263 3270

[olev@mayerbrown.com](mailto:olev@mayerbrown.com)

RICHARD ROSENFELD

Partner

+1 202 263 3130

[RRosenfeld@mayerbrown.com](mailto:RRosenfeld@mayerbrown.com)

April 2023

# TOPICS COVERED TODAY

- Enforcement Environment
- Early Stage: The Subpoena, Preservation & Deadlines
- Getting Started: Government Communications & Collection Tips
- Communications: Disclosure & Employees
- Practical Issues on Production & Testimony
- Business Changes
- Investigation, Remediation & Third Parties
- Preparing For the Long Haul

## ACTIVE ENFORCEMENT ENVIRONMENT

Enforcement under Biden Administration is now full-speed ahead,  
with fintechs squarely in focus for agency priorities

### SEC

Enforcement Division's ongoing efforts to streamline the Wells process and empower frontline staff  
– Deputy Director Wadhwa

SEC public pronouncements: ICOs, Fund Innovation, Crypto Holdings, Tokens, Etc. – Distributed Ledger Tech Working Group

### FTC

"We are investigating several firms for possible misconduct concerning digital assets"

"Keep your AI claims in check"

### CFPB

1022 Orders on BNPL & big tech

RFI on data brokers

Focus on algorithmic bias, dark patterns, data aggregation and competition

## Early Stage: The Subpoena (or CID)

When you receive a Subpoena, read the subpoena. It provides important basic information.

### What is the focus of this investigation?

- Many agencies include a (high-level) description of the investigation, potentially including companies and individuals involved
- CFPB: specific language used for third-party CIDs

Date range can provide a hint regarding specific events and timing triggering interest.

Read between the lines to understand the government's focus and possible theories.



# Early Stage: Preservation

After you read the subpoena, you need to preserve relevant documents and data.

- Document Preservation Hold

Consider the data holistically.

Suspend document retention and auto-deletion policies.

- Email, slack, CRM, financial data

Send hold notice, keyed to requests and sensitive to broad disclosure of investigation within company.

Inside tip: Government often asks when the hold was implemented and may request a copy.



## Early Stage: Deadlines

Deadlines to confer with government and to raise objections.

The "return date" is the due date. But that's almost always negotiable

- Some production typically due on original return date

Typically phased production on a rolling basis.

**Insider Tip: Tolling Agreements.**

- Beware: some agencies are demanding extensive tolling agreements in connection with even reasonable extension requests



# Getting Started: Calling the Government

- Every agency has a process for negotiating scope and/or challenging the subpoena
- Different levels of comfort with respect to negotiations over the scope of a subpoena
- Important to have counsel that knows agency practice and the boundaries of what agency staff can agree to

# Getting Started: Collection Best Practices

- One part law, one part project management
- Designate someone within the company as the point-person
- Identify individuals in the company who are knowledgeable about specific practices hinted at and document sources
- Tracking charts
- Insider Tip: Use lawyers to respond to protect privilege/work product

# Communications: Disclosures

- Disclosure considerations both public and contractual
  - Key: Assessing materiality of facts and the investigation itself
  - Common disclosure standards
  - Often no disclosure required until you get a formal notice from the government of potential action, not just investigation
  - Securities disclosure considerations
  - SOX "material violation" standard
- Insurance: consider steps to effect coverage

# Communications: Employees

- Preparing employees for government investigations requires sweat equity
- Especially for a young company, dealing with an agency investigation for the first time can be scary.
  - Prepare employees for the fact that government likely will be reading their emails.
  - Agencies often looking for individual liability, in addition to the company
- Special concern for former employees: they may be material witnesses

# Practical Issues on Production & Testimony

- Document Production
  - Agency-specific expectations regarding scope and mechanics
  - Email review and tactics for limiting scope
  - Preparing employees, gathering documents and preserving information
- Testimony
  - Fact witnesses and corporate witnesses
  - One-way testimony
  - Agency differences in use of testimony

# Other Considerations

- Internal Investigation: Do you want one and will it help?
  - Privilege considerations
- Business changes during the investigation
  - If the investigation reveals violations or compliance issues, consider remedial measures
  - Benefits include: cutting off liability, leniency with the government and, for FTC, possibly undermining ability to bring a case
  - Cons include: looking guilty, creating a record reflecting counterfactuals the agency can use to establish injury
- Third-party risk
  - Derivative action/class action

# Prepare for the Long Haul

Many investigations can last years

Agencies often have a process that they need to follow, even if there is no obvious law violation

- Investigations may need to satisfy many internal stakeholders
- Fighting against sense of agency investment of time/resources

Wells/NORA/Consent notice of possible action

- Written response
- Commissioner/agency meetings

Even if they find no violation, there are many ways an investigation can end

- Radio silence
- Closing letter



[Americas](#) | [Asia](#) | [Europe](#) | [Middle East](#)

[mayerbrown.com](https://mayerbrown.com)

Mayer Brown is a global services provider comprising associated legal practices that are separate entities, including Mayer Brown LLP (Illinois, USA), Mayer Brown International LLP (England), Mayer Brown (a Hong Kong partnership) and Tauil & Chequer Advogados (a Brazilian law partnership) (collectively the “Mayer Brown Practices”) and non-legal service providers, which provide consultancy services (the “Mayer Brown Consultancies”). The Mayer Brown Practices and Mayer Brown Consultancies are established in various jurisdictions and may be a legal person or a partnership. Details of the individual Mayer Brown Practices and Mayer Brown Consultancies can be found in the Legal Notices section of our website. “Mayer Brown” and the Mayer Brown logo are the trademarks of Mayer Brown. © Mayer Brown. All rights reserved.